Supreme Court of the United States

October Term, 1949

— No. 309 —

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 309, DICK KLINGE, Its Business Agent, and MEL ANDREWS, Its Secretary,
Petitioners,

vs.

A. E. HANKE, L. J. HANKE, R. R. HANKE and R. M. HANKE, Copartner, Doing Business Under the Name and Style of ATLAS AUTO REBUILD,
Respondents.

— No. 364 —

AUTOMOBILE DRIVERS AND DEMONSTRATORS LOCAL UNION No. 882, RALPH REINERTSEN, its Business Agent, and J. J. ROHAN, Its Secretary,
Petitioners,

vs.

GEORGE E. CLINE,
Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Supreme Court of the United States and The Honorable Justices Thereof:

The petitioners in these two cases, which were "disposed of" in a single opinion, respectfully apply for a rehearing. The opinion of the court was filed May 8, 1950, and, together with the dissenting opinions, is printed in the appendix hereto.

Rehearing and reconsideration is sought because it is quite generally believed by lawyers actively engaged in the practice and specializing in labor law that the opinion of the court, particularly when considered in the light of the dissenting opinions, has completely unsettled all fixed notions concerning the right to picket as a means of publicity in industrial controversies, and the right of the several states to limit and confine the scope of the Fourteenth Amendment.

As we understand the language of the majority opinion, the court has very definitely repudiated the "*Senn* doctrine," which the court has heretofore consisently applied from *Thornhill's* case, 310 U.S. 88, to *Angelos*, 320 U.S. 293, and has abruptly embarked upon a new construction of the Fourteenth Amendment which, if followed to its logical conclusion, would invest the county judges and the courts of the forty-eight states with practically unlimited power to govern by injunction—a power which the Congress of the United States, after many years of bitter struggle, took away from the inferior Federal courts. As bluntly stated by Mr. Justice Minton in his dissent, in which Mr. Justice Reed joined,

> "The outlawing of picketing for all purposes is permitted the State of Washington by the upholding of these broad decrees. *No distinction is made between what is legitimate picketing and what is abusive picketing.*" (Emphasis supplied)

And what the courts of the State of Washington are permitted to do today all the courts of the forty-eight states may do tomorrow.

Washington, by judicial policy contrary to the

crystal clear language of the state's Labor Disputes Act,[1] forbids peaceful picketing by members of labor unions, for any purpose or object, in the absence of an immediate employer-employee dispute. The decisions of the Supreme Court of Washington which established this policy, commencing in 1935, are cited and reviewed by that court in *Gazzam v. Building Service Employees International Union, etc.*, 29 Wn. (2d) 488, 188 P.(2d) 97, which this court affirmed (on the same day the cases at bar were decided) *sub nom Building Service Employees Union v. Gazzam* No. 449. In that case the Washington court had held the picketing involved unlawful for two reasons:

> "We hold that the acts of respondents, in so far as the picketing was concerned, were coercive—first, because they violated the provisions of Rem. Rev. Stat. (Sup.) Section 7612-2, and, second, because they were in violation of the rules of common law as announced in the cases just approved." (*Gazzam* case, No. 449—R. 24)

And, under these circumstances, that court further held that the decisions of this court in the *Swing*, *Wohl* and *Angelos* cases, construing the Fourteenth Amendment, were not controlling (*Gazzam* case, No. 449—R. 21, 24-25). (This court in the *Gazzam* case, No. 449, upheld a narrowly drawn decree restraining picketing for the *first* reason upon which the Washington court had based its decision.)

The decrees in the cases at bar were affirmed by the Washington court on the authority of the *second*

[1]Rem. Rev. Stat. (Supp.) Section 7612-16 (Analogue of the Federal Norris-LaGuardia Act).

branch of its holding in the *Gazzam* case, namely, that the picketing, although admittedly peaceful, was in violation of the state's common law rules which prohibit picketing for any purpose in the absence of the employer-employee relationship. Obviously, the first branch of its holding in the *Gazzam* case could not apply because no employer or employees are involved in the cases at bar. In the *Hanke* case, No. 309, the Washington court said:

> "The factual situation in the case before us bears a close resemblance to that which obtained in the recent case of *Gazzam v. Building Service Employees International Union, Local 262*, reported in 29 Wn.(2d) 488, 188 P.(2d) 97. In fact, it seems to be agreed between the parties herein that, unless that case be now overruled, it is controlling of the case at bar. (R. 23)
>
> * * * * * * *
>
> "The substance of our holding in the *Gazzam* case, *supra*, is, as was succinctly stated in the first headnote of the opinion, that peaceful picketing of an employer's place of business is not protected by the constitutional guaranty of free speech and is unlawful, *where the employees are not members of the picketing union and the purpose of the picketing is to force the employees to join the union* * * *." (R. 26) (Emphasis supplied)

That the picketing was enjoined solely because it violated the common law rules is made doubly clear by what the Washington court said in the *Cline* case, No. 364:

> "We are of the opinion that this case is controlled by the principles announced in the *Gaz-*

zam case, *supra*, * * *; *that respondent did not have in his employ at the time this action was commenced, nor had he ever had in his employ, a member of appellant union.*" (R. 24) (Emphasis supplied)

In each of these cases the respondents pleaded in their complaints, in substance, that they employed no members of the union or any employees and, therefore, there was no "labor dispute" (No. 309, R. 1; No. 364, R. 1) and the answer of the petitioners was, that while respondents employed no members of the union there was, nevertheless, a labor dispute and that the picketing to publicize the facts of that dispute was protected by the Fourteenth Amendment (No. 309, R. 7-8; No. 364, R. 10-12). This was the issue, and the only issue, which the parties made in the courts below, and, as noted above, in enjoining the picketing both courts below applied common law rules or judicial policy above mentioned. Thus in the *Hanke* case the Supreme Court of Washington said:

"It will be borne in mind that, at the time the picketing was started by the appellants, the respondents had no hired help, but themselves did all the work connected with the operation of their business; that no member of their partnership was a member of either Local 309 or Local 882." (R. 23)

And in the *Cline* case:

"Respondent at no time has had in his employ any member of appellant union (R. 22). * * *

"We are of the opinion that the testimony is undisputed that at the time this action was commenced, at which time respondent's place of busi-

> ness was being picketed by appellant union, respondent was not a member of appellant union; * * * that respondent did not have in his employ at the time this action was commenced, nor had he ever had in his employ, a member of appellant union." (R. 24)

This, we submit, is the "gloss" of the Supreme Court of Washington which, when read with the decrees, conclusively demonstrates that the picketing was enjoined only because respondents did not employ any member of the Union.[2]

There has never been and it was not contended in either of these cases that there was in the State of Washington "a policy in favor of self-employers," exempting them from peaceful picketing by members of labor unions. Furthermore, the Washington Supreme Court did not say in either of its opinions in these cases that there was such a policy. It has been gratuitously attributed to the State of Washington by the opinion of the Supreme Court of the United States—an opinion in which only four of the Justices concur, Mr. Justice Clark concurring only in the result.

We petitioned this Court, in good faith, to review these cases relying on the prior holdings of the Court that "members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal constitution." (*Senn v. Tile Layers Protective Union*, 301 U.S. 468); that "in the

[2]This point is fully argued and the decisions of the state court analyzed and quoted in our reply brief in the *Cline* case, No. 364, at pages 1-12.

circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution" (*Thornhill's Case*, 310 U.S. 88, 102); that "peaceful picketing is the workingman's means of communication" (*Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 293); that "the scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the *judicial organ of the state*," that "a state can not exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him," that the right to peacefully picket "cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ," that communication by members of a union of the facts of a dispute, deemed by them to be relevant to their interests," can not "be barred because of concern for the economic interests against which they are seeking to enlist public opinion" (*American Federation of Labor v. Swing*, 312 U.S. 321, 326); that "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive" (*Bakery Drivers v. Wohl*, 315 U.S. 769, 774), and that all of these rights were guaranteed by the Fourteenth Amendment even when

the controversy was between a union and "self-employers" (*Bakery Drivers v. Wohl, supra, Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 296).

To our consternation, we are now told by specific and general expressions in the opinion of the Court, some of which are not free from ambiguity, that these rights are guaranteed by the Constitution only until a state by judicial fiat adopts or declares "a policy in favor of self-employers" (Opinion, page 10, Appendix hereto). The *Swing*, *Wohl* and *Angelos* cases are brushed aside in a single sentence:

> "In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute." (Citing as authority a Harvard law professor) (Opinion, page 10, Appendix)

We venture to say that the bar, like the dissenting Justices, did not understand such to be the holding of the court in those cases. This sentence, when read in context and with other general expressions in the opinion, is open to the construction that it is for the State courts to determine for themselves in each case what constitutes "artificial bounds, unreal in the light of modern circumstances." Does this expression mean, contrary to the holding of the court in the *Swing* case, that "the scope of the Fourteenth Amendment IS * * * confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state?" Other expressions in the opinion indicate that it does: For example, at

page 5 of the opinion we are told that the State courts have the power "to set the limits of permissible contest open to industrial combatants," but, while their judgment in setting the limits or "striking a balance" is subject to the limitations of the Fourteenth Amendment such a judgment when it reaches this Court bears "a weighty title of respect." The State courts, with justification, will undoubtedly construe this to mean that their judgment with respect to social-economic policies in this field will seldom, if ever, be disturbed by the Supreme Court of the United States. This is supported by the following sentence of the opinion (page 5):

> "These two cases emphasize the nature of a problem that is presented by our duty of sitting in judgment on a State's judgment in striking the balance that has to be struck *when a State decides not to keep hands off these industrial contests.*" (Emphasis supplied)

And by these expressions on the following page:

> "Whether to prefer the union or a self-employer in such a situation, or to seek partial recognition of both interests, and, if so, by what means to secure such accommodation, obviously presents to a State serious problems. There are no sure answers, and the best available solution is likely to be experimental and tentative, and always subject to the control of the popular will. * * * Washington here concluded that even though the relief afforded Hankes and Cline entailed restrictions upon communication that the union sought to convey through picketing, it was more important to safeguard the value which the state placed upon self-employers * * *." (Opinion page 7, Appendix)

Indeed, this last may be construed as meaning, and the state courts will undoubtedly so construe it, that the Washington court having concluded that it was more "equitable" to enjoin the picketing than to permit respondents to sustain an economic loss, the injunctions did not infringe the Fourteenth Amendment.

Finally, on page 8 of the opinion, the "majority" further says:

> "It is not our business even remotely to hint at agreement or disagreement with what has commended itself to the State of Washington, or even to intimate that all the relevant considerations are exposed in the conclusions reached by the Washington court. They seldom are in this field, so deceptive and opaque are the elements of these problems. That is precisely what is meant by recognizing that they are within the domain of a State's public policy. Because there is lack of agreement as to the relevant factors and divergent interpretations of their meaning, as well as differences in assessing what is the short and what is the long view, the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword."

These general expressions all add up to this: The Supreme Court of the United States will not interfere with any policy which may commend itself to the courts of the forty-eight states even though such policy deprives workingmen of rights guaranteed by the First and Fourteenth Amendments. If the citizens of the several states disapprove the policies which their judges declare, the remedy is the ballot box and not

the protection of the First and Fourteenth Amendments.

At several places in the opinion it is inferred that the picketing involved in these two cases was for an unlawful purpose or object. Near the top of page 10 it is said:

> "In any event, it is not for this court to question the State's judgment in regulating only where an *evil* seems to it most conspicuous * * *. Indeed in *Wohl* this court expressly noted that the State courts had not found that the picketing there condemned was for a defined *unlawful object.* * * * So read, the injunctions (here) are directed solely against picketing for the *ends defined* by the parties before the Washington court and this court." (Emphasis supplied)

Neither the Washington court nor this Court informs us what these evils or unlawful objects are. Is the picketing of self-employers in an industrial controversy of itself, regardless of purpose, an evil or unlawful object? Or is such picketing evil or unlawful because its purpose was to withdraw from self-employers union patronage and thereby persuade them to observe union hours? Or was the picketing in these cases unlawful because the pickets noted the automobile license numbers of respondent's patrons, and in a single instance one of respondents' driveways was obstructed by the picket? Or was the picketing unlawful because it was effective? The opinion sheds no light. The bar and the State courts are left to speculate and surmise.

Further adding to the confusion the majority opinion says in its concluding sentences:

> "Our affirmance of these injunctions is in conformity with the reading derived from the Washington court's opinions. If astuteness may discover argumentative excess in the scope of the injunctions beyond what we constitutionally justify by this opinion, it will be open to petitioners to raise the matter, which they have not raised here, when the cases on remand reach the Washington court."

We repeat again the injunctions here are sweeping in character—they prohibit all picketing of respondents' places of business for all purposes. They are identical in language:

> "ORDERED, ADJUDGED AND DECREED that the defendants, and each of them, be and they are hereby permanently restrained and enjoined from in any manner picketing the plaintiffs' place of business." (Case No. 309, R. 17; Case No. 364, R. 16)

Because they are unlimited in "scope" we are at a loss to understand what the majority "constitutionally justify by this opinion."

This no doubt prompted Mr. Justice Minton to say in his dissent:

> "The decrees entered in the instant cases were not tailored to meet the evils of threats and intimidation as *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295, indicates they might have been; * * * (page 1)
>
> "The outlawing of picketing for all purposes is permitted the State of Washington by the upholding of these broad decrees. No distinction is made between what is legitimate picketing and what is abusive picketing. '*Here we have no at-*

tempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket.' Angelos case, 320 U.S. at 295." (page 4) (Emphasis supplied)

We have not overlooked the question which the majority opinion says is presented:

> "Does the Fourteenth Amendment of the Constitution bar a State from use of the injunction to prohibit picketing of a business conducted by the owner himself without employees in order to secure compliance by him with *a demand to become a union shop?*" (Opinion page 1, Appendix) (Emphasis supplied)

If by "demand to become a union shop" is meant that the picketing was conducted in order to secure compliance with union hours of work in both cases and in the *Cline* case, No. 364, to compel him to employ a union member, the statement of the question is correct. However, the statement which the Supreme Court of Washington made in the *Hanke* case, No. 309, concerning this matter is not true. That court said:

> "The purpose of the picketing in the present instance was (1), indirectly, to compel the respondents to become members of one or the other, or possibly both, of the unions above mentioned; and (2), directly, to coerce the respondents to enter into an agreement under which they would carry on their business only during those hours and days arbitrarily fixed by the Automobile Salesmen's Union, Local 882."

As pointed out in the brief of the American Federation of Labor as *amicus curiae* (p. 4) this statement that it was indirectly the purpose of appellants to com-

pel respondents to become members of the union is a gratuitous assumption not based on anything in the record and directly contrary to the unchallenged specific finding of the trial court that the union "did not insist on the plaintiffs becoming members of said Local 882 or the defendant Local No. 309" (R. 14). Accordingly, this assumption of the Supreme Court of Washington concerning the purpose of the picketing must be disregarded. Such findings and statements have been characterized by this court as "spurious findings of fact" and as "insubstantial findings of fact screening reality," designed to defeat the guaranties of the Bill of Rights. (*Wagon Drivers v. Meadowmoor*, 312 U.S. 287, 293, 299). But viewing this matter, for the sake of the argument, as the Supreme Court of Washington viewed it, in what respect do these cases differ from the *Angelos* case? There, as here, the plaintiffs were self-employers—copartners—who operated a cafeteria without the assistance of outside help. The object of the picketing, as this court found, was to "organize" plaintiffs' cafeteria, and this was the only object of the picketing in the cases at bar. The Court of Appeals of New York had assigned the same reasons as did the Supreme Court of Washington for enjoining the picketing. We quote from the New York court's opinion:

> "It has been found by the lower courts that the picketing of the World Cafeteria was at all times orderly and peaceful and that no acts of violence had been threatened or committed by the defendant union. The defendants had the constitutional right accurately and truthfully and without violence, force or coercion, or conduct otherwise un-

lawful or oppressive to make their grievances known to the public. *Wohl v. Bakery and Pastry Drivers and Helpers Local 802, of International Brotherhood of Teamsters, supra.* But a citizen is not required to tolerate peaceful picketing accompanied by untruthful representations, interference with his business or coercive conduct designed to injure or destroy his business *whether a labor dispute exists or not. Busch Jewelry Co. v. United Retail Employees Union, Local 830,* 281 N.Y. 150, 22 N.E.2d 320, 124 A.L.R. 744; *Wohl v. Bakery and Pastry Drivers and Helpers Local 802, of International Brotherhood of Teamsters, supra.* Unlike the record in the *Wohl* case, there are findings of fact here to sustain the decree. In this case it has been found that individuals under the control of the defendants have been picketing the plaintiffs' cafeteria, bearing false and misleading signs that tend to create the impression that the plaintiffs are unfair to organized labor and that the pickets were previously employed by the plaintiffs, which representations were false and known by the defendants to be false, since there were no employees at the place of business of the plaintiffs and the plaintiffs were not unfair to organized labor; that such pickets approached prospective customers of the plaintiffs and told them that the plaintiffs' restaurant was giving bad food, and that by patronizing said restaurant they were aiding the cause of Fascism; and that the pickets directed customers about to enter the plaintiffs' place of business to a cafeteria across the street which was a competitor of the plaintiffs. *By no authoritative decision has it been held that such conduct is not subject to judicial restraint. On the contrary, unlawful and coercive conduct will*

> *be enjoined where it has been found that such conduct has caused damage and will cause irreparable damage if permitted to continue and the party who is so damaged or threatened to be damaged has no adequate remedy at law. Busch Jewelry Co. v. United Retail Employees Union, Local 830, supra,* 281 N.Y. at page 156, 22 N.E. 2d 320, 124 A.L.R. 744." (*Angelos v. Mesevich,* 289 N.Y. 498, 46 N.E.2d 903, 905-6) (Emphasis supplied)

It will be noted that the Washington court, like the New York court, was chiefly concerned with property rights and the economic welfare of the "self-employers," wholly ignoring the interests of the union members who were in competition with them in the same industry. The Washington court said:

> "We do not believe that the United States Supreme Court has ever held that the right of free speech is an absolute right, to be protected regardless of the deleterious effect so produced in regard to other interests also protected by the Federal constitution; nor do we believe that the United States Supreme Court has ever said that a state is without power to abridge this right where such a course is necessary to protect property rights and is in the general interests of the community." (Case No. 309, R. 27)

Reversing the judgment of the Court of Appeals of New York in the *Angelos* case, *supra,* this court disregarded the economic considerations which the New York court thought justified the injunction, and applied the "Senn Doctrine," saying in part:

> "That the picketing under review was peaceful was not questioned. And to use loose language or undefined slogans that are part of the conven-

> tional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts. In a setting like the present, continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives. *But here we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket. We have before us a prohibition as unrestricted as that which we found to transgress state power in American Federation of Labor v. Swing*, 312 U.S. 321, 85 L. ed. 855, 61 S. Ct. 568, *supra*." (320 U.S. 293, 295; Emphasis supplied)

While the Washington court in the *Hanke* case made a strong effort to distinguish the *Wohl* case (R. 29-30), it made no attempt whatever to distinguish the *Angelos* case, although Judge Robinson, dissenting, stated that the two cases were indistinguishable (R. 33). Nor does this court tell us how these cases differ from the *Angelos* case. The court, we submit, should either reaffirm and here apply the principles of the *Angelos* case or overrule it. This should be done for reasons forcefully stated by Mr. Justice Frankfurter in the recent case of *United States v. Rabinowitz*, No. 293, decided February 20, 1950, wherein he said:

> "We are asked to overrule decisions based on a long course of prior unanimous decisions, drawn from history and legislative experience. In overruling Trupiano we overrule the underlying principle of a whole series of recent cases: *United States v. Di Re*, 332 U.S. 581, 92 L. ed. 210, 68 S. Ct. 222; *Johnson v. United States*, 333 U.S. 10, 92 L. ed. 436, 68 S. Ct. 367; *McDon-*

> *ald v. United States*, 335 U.S. 451, 93 L. ed. 153, 69 S. Ct. 184, based on the earlier cases. For these cases ought not to be allowed to remain as derelicts on the stream of the law, if we overrule Trupiano. These are not outmoded decisions eroded by time. Even under normal circumstances, the Court ought not to overrule such a series of decisions where no mischief flowing from them has been made manifest. Respect for continuity in law, where reasons for change are wanting, alone requires adherence to Trupiano and the other decisions. Especially ought the Court not needlessly reenforce the instabilities of our day by giving fair ground for the belief that Law is the expression of chance — for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors."

The petitioners firmly believe that the principles of the *Angelos* case, which were approved by a unanimous court, should be applied here and the judgments reversed. But whether or not these judgments are permitted to stand is of relatively small importance. The vitally important thing is that the opinion of the court should be reconsidered and clarified with respect to the matters we have attempted to point out, in order that the courts and the bar may reasonably understand how far the power of the state courts extends "to set the limits of permissible contest open to industrial combatants" when injunctions are sought against peaceful picketing. The courts and the bar should know with reasonable certainty what constitutes "artificial bounds" and what are real bounds "in the light of modern circumstances." If there were abuses in these

cases which warranted injunctive relief they should be pointed out in order that organized labor may govern itself accordingly. Otherwise the right of workingmen to peacefully picket in industrial disputes will depend entirely upon the varying theories and economic prejudices of the state courts, and this inevitably will result in years of confusion and uncertainty of the law, attended by a flood of expensive litigation and applications to this Court for writs of certiorari.

The majority opinion, as already noted, has the approval of only four of the Justices. Mr. Justice Clark concurred only in the result, Mr. Justice Douglas did not participate and three Justices dissented. Under these circumstances and because it is the opinion of practicing lawyers specializing in labor law that the doctrine laid down in the opinion is a radical departure from the past, a rehearing should be granted and the cases reconsidered by the entire Court.

Respectfully submitted,

SAMUEL B. BASSETT,
JOHN GEISNESS,
Attorneys for Petitioners.

Dated this 26th day of May, 1950.

CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition for rehearing; that in my opinion the petition is well founded and that it is presented in good faith and not for delay.

SAMUEL B. BASSETT,
Attorney for Petitioners.

APPENDIX

SUPREME COURT OF THE UNITED STATES

Nos. 309 AND 364.—OCTOBER TERM, 1949.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 309, et al., Petitioners,

309 v.

A. E. Hanke, L. J. Hanke, R. R. Hanke, and R. M. Hanke, Copartners, D. B. A. Atlas Auto Rebuild.

Automobile Drivers and Demonstrators Local Union No. 882, Ralph Reinertsen, Its Business Agent, et al., Petitioners,

364 v.

George E. Cline.

On Writs of Certiorari to the Supreme Court of the State of Washington.

[May 8, 1950.]

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE BURTON concurred.

These two cases raise the same issues and are therefore disposed of in single opinion. The question is this: Does the Fourteenth Amendment of the Constitution bar a State from use of the injunction to prohibit the picketing of a business conducted by the owner himself without employees in order to secure compliance by him with a demand to become a union shop?

In No. 309, respondents A. E. Hanke and his three sons, as copartners, engaged in the business of repairing automobiles, dispensing gasoline and automobile

accessories, and selling used automobiles in Seattle. They conducted their entire enterprise themselves, without any employees. At the time the senior Hanke purchased the business in June, 1946, which had theretofore been conducted as a union shop, he became a member of Local 309 of the International Brotherhood of Teamsters, which includes in its membership persons employed and engaged in the gasoline service station business in Seattle. Accordingly, the Hankes continued to display in their show window the union shop card of their predecessor. Local 309 also included the Hankes' business in the list of firms for which it urged patronage in advertisements published in the Washington organ of the International Brotherhood of Teamsters, distributed weekly to members. As a result of the use of the union shop card and these advertisements, the Hankes received union patronage which they otherwise would not have had.

Automobile Drivers and Demonstrators Local 882, closely affiliated with Local 309 and also chartered by the International Brotherhood of Teamsters, includes in its membership persons engaged in the business of selling used cars and used car salesmen in Seattle. This union negotiated an agreement in 1946 with the Independent Automobile Dealers Association of Seattle, to which the Hankes did not belong, providing that used car lots be closed by 6 p. m. on weekdays and all day on Saturdays, Sundays and eight specified holidays. This agreement was intended to be applicable to 115 used car dealers in Seattle, all except ten of which were self-employers with no employees.

It was the practice of the Hankes to remain open nights, weekends and holidays. In January, 1948, representatives of both Locals called upon the Hankes to urge them to respect the limitation on business hours in the agreement or give up their union shop card. The Hankes refused to consent to abide by the agreement,

claiming that it would be impossible to continue in business and do so, and surrendered the union shop card. The name of the Hankes' business was thereafter omitted from the list published by Local 309 in its advertisements.

Soon afterwards the Local sent a single picket to patrol up and down peacefully in front of the Hankes' business between the hours of 8:30 a. m. and 5 p. m., carrying a "sandwich sign" with the words "Union People Look for the Union Shop Card" and a facsmile of the shop card. The picket also wrote down the automobile license numbers of the Hankes' patrons. As a result of the picketing, the Hankes' business fell off heavily and drivers for supply houses refused to deliver parts and other needed materials. The Hankes had to use their own truck to call for the materials necessary to carry on their business.

To restrain this conduct, the Hankes brought suit against Local 309 and its officers. The trial court granted a permanent injunction against the picketing and awarded the Hankes a judgment of $250, the sum stipulated by the parties to be the amount of damage occasioned by the picketing. The Supreme Court of Washington affirmed. 207 P.2d 206.

The background in No. 364 is similar. George E. Cline engaged in the used car business in Seattle, performing himself the services of his business here relevant. He was induced by the threat of picketing to join Automobile Drivers Local 882 in 1946, and in that year he also became a member of the Independent Automobile Dealers Association of Seattle which negotiated with Local 882 the agreement as to business hours to which reference has been made.

In August, 1947, Cline advised Local 882 that he did not intend to continue membership in the union and that he was no longer a member of the Independent Automobile Dealers Association. He announced that

he did not consider himself bound by the agreement as to business hours and that he intended to operate on Saturdays. When Cline proceeded to do so Local 882 began to picket his business.

The picketing was conducted peacefully, normally by two pickets who patrolled up and down carrying "sandwich signs" stating that Cline was unfair to the union. The pickets took down the automobile license numbers of Cline's patrons, and when inquiry was made by patrons as to why they were doing so, their reply was: "You'll find out." Because of interference by the pickets with the use of one of Cline's driveways, he was forced to close it to avoid the possibility of one of the pickets being run over. As a result of the picketing, Cline's business fell off and, as in No. 309, drivers for supply houses refused to deliver parts and other needed materials. Cline had to use his own vehicle to call for supplies necessary to carry on the business.

Local 882 reached a new agreement with the Independent Automobile Dealers Association in April, 1948. As a condition to removal of the picket line, the union demanded that Cline agree to keep his business closed after 1 p. m. on Saturdays and to hire a member of the union as a salesman to be compensated at the rate of seven percent of the gross sales regardless of whether they were made by Cline of this employee. Suit by Cline to restrain patrolling of his business resulted in a permanent injunction against the union and its officers—Cline waived his claim for damages—and the Supreme Court of Washington, relying on its decision in the *Hanke* case, affirmed. 207 P.2d 216.

In both these cases we granted certiorari to consider claims of infringement of the right of freedom of speech as guaranteed by the Due Process Clause of the Fourteenth Amendment. 338 U. S. 903.

Here, as in *Hughes* v. *Superior Court*, *ante* p. —, we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be

equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is "indeed a hybrid." Freund, On Understanding the Supreme Court 18 (1949). See also Jaffe, *In Defense of the Supreme Court's Picketing Doctrine,* 41 Mich. L. Rev. 1037 (1943). The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and "the power of the State to set the limits of permissible contest open to industrial combatants." *Thornhill v. Alabama,* 310 U. S. 88, 104.[1] A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect.

These two cases emphasize the nature of a problem that is presented by our duty of sitting in judgment on a State's judgment in striking the balance that has to be struck when a State decides not to keep hands off these industrial contests. Here we have a glaring instance of the interplay of competing social-economic interests and viewpoints. Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profoundest thinkers from Jefferson to Brandeis have stressed the importance to a democratic society of encouraging

[1] It is relevant to note that the Alabama statute held unconstitutional in the *Thornhill* case had been construed by the State courts to prohibit picketing without "exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and accurateness of the terminology used in notifying the public of the facts of the dispute." 310 U. S. at 99.

self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power. "There is a widespread belief . . . that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men . . . and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty." Mr. Justice Brandeis, dissenting in *Liggett Co.* v. *Lee*, 288 U. S. 517, 541, 580.

Whether to prefer the union or a self-employer in such a situation, or to seek partial recognition of both interests, and, if so, by what means to secure such accommodation, obviously presents to a State serious problems. There are no sure answers, and the best available solution is likely to be experimental and tentative, and always subject to the control of the popular will. That the solution of these perplexities is a challenge to wisdom and not a command of the Constitution is the significance of *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468. Senn, a self-employed tile layer who occasionally hired other tile layers to assist him, was picketed when he refused to yield to the union demand that he no longer work himself at his trade. The Wisconsin court found the situation to be within the State's anti-injunction statute and denied relief. In rejecting the claim that the restriction upon Senn's freedom was a denial of his liberty under the Fourteenth Amendment, this Court held that it lay in the domain of policy for Wisconsin to permit the picketing: "Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern." 301 U. S. at 481.

This conclusion was based on the Court's recognition that it was Wisconsin, not the Fourteenth Amendment,

which put such picketing as a "means of publicity on a par with advertisements in the press."[2] 301 U. S. at 479. If Wisconsin could permit such picketing as a matter of policy it must have been equally free as a matter of policy to choose not to permit it and therefore not to "put this means of publicity on a par with advertisements in the press." If Wisconsin could have deemed it wise to withdraw from the union the permission which this Court found outside the ban of the Fourteenth Amendment, such action by Washington cannot be inside that ban.[3]

Washington here concluded that even though the relief afforded the Hankes and Cline entailed restriction upon communication that the unions sought to convey through picketing, it was more important to safeguard the value which the State placed upon self-employers, leaving all other channels of communication open to the union. The relatively small interest of the unions considerably influenced the balance that was struck.

[2] The Court said: "In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press." 301 U. S. at 479. To assume that this sentence is to be read as though the picketing was permitted by Wisconsin not as a matter of choice but because the Fourteenth Amendment compelled its allowance is to assume that so careful a writer as Mr. Justice Brandeis, the author of the Court's opinion, meant the above sentence to be read as though it contained the bracketed insertion as follows: "In declaring such picketing permissible Wisconsin [recognized that the Fourteenth Amendment] has put this means of publicity on a par with advertisements in the press." In other words, it is suggested that the bracketed interpolation which Justice Brandeis did not write is to be read into what he did write although thereby its essential meaning would be altered.

[3] Of course, the true significance of particular phrases in *Senn* appears only when they are examined in their context: "Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets." 301 U. S. at 478.

Of 115 used car dealers in Seattle maintaining union standards all but ten were self-employers with no employees. "From this fact," so we are informed by the Supreme Court of Washington, "the conclusion seems irresistable that the union's interest in the welfare of a mere handful of members' (of whose working conditions no complaint at all is made) is far outweighed by the interests of individual proprietors and the people of the community as a whole, to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy." 207 P.2d at 213.

We are, needless to say, fully aware of the contentious nature of these views. It is not our business even remotely to hint at agreement or disagreement with what has commended itself to the State of Washington, or even to intimate that all the relevant considerations are exposed in the conclusions reached by the Washington court. They seldom are in this field, so deceptive and opaque are the elements of these problems. That is precisely what is meant by recognizing that they are within the domain of a State's public policy. Because there is lack of agreement as to the relevant factors and divergent interpretations of their meaning, as well as differences in assessing what is the short and what is the long view, the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword. Invalidation here would mean denial of power to the Congress as well as to the forty-eight States.

It is not for us to pass judgment on cases not now before us. But when one considers that issues not unlike those that are here have been similarly viewed by other States[4] and by the Congress of the United

[4] See, *e. g.*, *Bautista* v. *Jones*, 25 Cal. 2d 746, 155 P. 2d 343; *Dinoffria* v. *International Brotherhood of Teamsters and Chauffeurs*, 331 Ill. App. 129, 72 N. E. 2d 635; *Savcall* v. *Demers*, 322 Mass. 70, 76 N. E. 2d 12.

States,[5] we cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that Washington has offended the Constitution.

We need not repeat the considerations to which we adverted in *Hughes* v. *Superior Court* that make it immaterial, in respect to the constitutional issue before us, that the policy of Washington was expressed by its Supreme Court rather than by its legislature. The Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches. *Dreyer* v. *Illinois*, 187 U. S. 71, 83-84; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 225. "[R]ights under that amendment turn on the power of the State, no matter by what organ it acts." *Missouri* v. *Dockery*, 191 U. S. 165, 170-71.

Nor does the Fourteenth Amendment require prohibition by Washington also of voluntary acquiescence in the demands of the union in order that it may choose to prohibit the right to secure submission through picketing. In abstaining from interference with such voluntary agreements a State may rely on self-interest. In any event, it is not for this Court to question a State's judgment in regulating only where an evil seems to it most conspicious.

What was actually decided in *American Federation*

[5] Section 8 (b) (4) (A) of the Labor Management Relations Act, 1947, makes it an unfair labor practice for a union "to engage in . . . a strike . . . where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization." 61 Stat. 142, 29 U. S. C. Supp. I § 158 (b) (4) (A). See also §§ 10 (l) and 303 of this Act.

of Labor v. *Swing*, 312 U. S. 321, *Bakery & Pastry Drivers & Helpers Local* v. *Wohl*, 315 U. S. 769, and *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, does not preclude us from upholding Washington's power to make the choice of policy she has here made. In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute.[6] See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 30 (1947). The power of a State to declare a policy in favor of self-employers and to make conduct restrictive of self-employment unlawful was not considered in those cases. Indeed in *Wohl* this Court expressly noted that the State courts had not found that the picketing there condemned was for a defined unlawful object. 315 U. S. at 774.

When an injunction of a State court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State court. The injunctions in these two cases are to be judged here with all the limitations that are infused into their terms by the opinions of the Washington Supreme Court on the basis of which the judgments below come before us. So read, the injunctions are directed solely against picketing for the ends defined by the parties before the Washington court and this Court. To treat the injunctions otherwise—to treat them, that is, outside the scope of the issues which they represent—is to deal with a case that is not here and was not before the Washington court. In considering an injunc-

[6] As to the Court's duty to restrict general expressions in opinions in earlier cases to their specific context, see *Cohens* v. *Virginia*, 6 Wheat. 264, 399-400; *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132-33.

tion against picketing recently, we had occasion to reject a similar claim of infirmity derived not from the record but from unreality. What we then said is pertinent now: "What is before us . . . is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it." *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin E. R. B.*, 315 U. S. 437, 441. Our affirmance of these injunctions is in conformity with the reading derived from the Washington court's opinions. If astuteness may discover argumentative excess in the scope of the injunctions beyond what we constitutionally justify by this opinion, it will be open to petitioners to raise the matter, which they have not raised here, when the cases on remand reach the Washington court.

Affirmed.

MR. JUSTICE CLARK concurs in the result.

MR. JUSTICE BLACK dissents for substantially the reasons given in his dissent in *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, 729-32.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 309 and 364.—October Term, 1949.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 309, et al., Petitioners,

309 *v.*

A. E. Hanke, L. J. Hanke, R. R. Hanke, and R. M. Hanke, Copartners, D B. A. Atlas Auto Rebuild.

Automobile Drivers and Demonstrators Local Union No. 882, Ralph Reinertsen, Its Business Agent, et al., Petitioners,

364 *v.*

George E. Cline.

On Writs of Certiorari to the Supreme Court of the State of Washington.

[May 8, 1950.]

Mr. Justice Minton, with whom Mr. Justice Reed joins, dissenting.

Petitioners in each of these cases were "permanently restrained and enjoined from in any manner picketing" the places of business of respondents. The picketing here was peaceful publicity, not enmeshed in a pattern of violence as was true in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287; nor was there violence in the picketing, as in *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin E. R. B.*, 315 U. S. 437. The decrees entered in the instant cases were not tailored to meet the evils of threats and intimidation as *Cafeteria Employees Union* v. *Angelos*,

320 U. S. 293, 295, indicates they might have been; nor were they limited to restraint of picketing for the purpose of forcing the person picketed to violate the law and public policy of the state, as were the decrees in *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, and *Building Service Employees Union* v. *Gazzam*, No. 449, this day decided. The abuses of picketing involved in the above cases were held by this Court not to be protected by the Fourteenth Amendment from state restraint.

It seems equally clear to me that peaceful picketing which is used properly as an instrument of publicity has been held by this Court in *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U.S. 106; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Bakery & Pastry Drivers & Helpers Local* v. *Wohl*, 315 U. S. 769; and *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, to be protected by the Fourteenth Amendment. I do not understand that in the last three mentioned cases this Court, as the majority in its opinion says, "held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute." If the states may set bounds, it is not for this Court to say where they shall be set, unless the setting violates some provision of the Federal Constitution. I understand the above cases to have found violations of the federal constitutional guarantee of freedom of speech, and the picketing could not be restrained because to do so would violate the right of free speech and publicity. This view is plainly stated by this Court in *Cafeteria Employees Union* v. *Angelos*, 320 U. S. at 295:

> "In *Senn* v. *Tile Layers Union*, 301 U. S. 468, this Court ruled that members of a union might, 'without special statutory authorization by a State,

make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' 301 U. S. at 478. Later cases applied the *Senn* doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy. *A. F. of L.* v. *Swing*, 312 U. S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769."

All the recent cases of this Court upholding picketing, from *Thornhill* to *Angelos*, have done so on the view that "peaceful picketing and truthful publicity" (see 320 U. S. at 295) is protected by the guaranty of free speech. This view stems from Mr. Justice Brandeis' statement in *Senn* that "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." 301 U. S. 468, 478. In that case Justice Brandeis was dealing with action of Wisconsin that *permitted* picketing by a labor union of a one-man shop. Of course, as long as Wisconsin allowed picketing, there was no interference with freedom of expression. By permitting picketing the State was allowing the expression found in "peaceful picketing and truthful publicity." There was in that posture of the case no question of conflict with the right of free speech. But because Wisconsin could permit picketing, and not thereby encroach upon freedom of speech, it does not follow that it could forbid like picketing; for that might involve conflict with the Fourteenth Amendment. It seems to me that Justice Brandeis, foreseeing the problem of the converse, made the statement above quoted in order to indicate that picketing could be protected by the free speech guaranty of the Federal Constitution.

Whether or not that is what Justice Brandeis meant, I think this Court has accepted that view, from *Thornhill* to *Angelos*. It seems to me too late now to deny that those cases were rooted in the free speech doctrine. I think we should not decide the instant cases in a manner so alien to the basis of prior decisions.

The outlawing of picketing for all purposes is permitted the State of Washington by the upholding of these broad decrees. No distinction is made between what is legitimate picketing and what is abusive picketing. "[H]ere we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket." *Angelos* case, 320 U. S. at 295.

Because the decrees here are not directed at any abuse of picketing but at all picketing, I think to sustain them is contrary to our prior holdings, founded as they are in the doctrine that "peaceful picketing and truthful publicity" is protected by the constitutional guaranty of the right of free speech. I recognize that picketing is more than speech. That is why I think an abuse of picketing may lead to a forfeiture of the protection of free speech. Tested by the philosophy of prior decisions, no such forfeiture is justified here.

I would reverse the judgments in these two cases.